IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA DAVENPORT DIVISION

RICHARD M. ROJEK,

Plaintiff,

No. 3:02-cv-40027

VS.

FEDERAL EMERGENCY MANAGE-MENT AGENCY, and NATIONAL CON-SERV, INC.,

Defendants.

RULING ON
NATIONAL CON-SERV, INC.'S
MOTION FOR
SUMMARY JUDGMENT

This matter comes before the Court on Motion for Summary Judgment filed by Defendant, National Con-Serv, Inc. The case arises out of a major flood which overwhelmed the city of Davenport, Iowa, on April 4, 2001. Defendant Federal Emergency Management Agency [hereinafter "FEMA"], as its name suggests, manages federal responses to emergencies such as this Davenport flood. One of FEMA's divisions, the Federal Insurance Administration, is in charge of administering the National Flood Insurance Program [hereinafter "NFIP"]. 42 U.S.C. §§ 4001-4129 (2000).

Plaintiff Richard M. Rojek [hereinafter "Rojek"] possessed a Standard Flood Insurance Policy which insured certain property against flood loss. The Standard Flood Insurance Policy that Rojek possessed was issued pursuant to the National Flood Insurance Program.

Coverage for the total amount of the loss under the Standard Flood Insurance Policy was denied to Rojek. Thereafter, Rojek filed suit against both FEMA and National Con-Serv, Inc., [hereinafter "NCSI"], the designated servicing agent of FEMA under the NFIP. <u>See</u> 44 C.F.R. 62.3(b).

On July 23, 2002, NCSI moved for summary judgment on the grounds that the insurance contract provided to Rojek pursuant to the NFIP was a contract between Rojek and FEMA; that FEMA was the only proper defendant in this action; that, pursuant to 42 U.S.C. § 4072, the director of FEMA is the proper party to be sued after the disallowance of Rojek's claim; and that NCSI would be immune from such a suit. In his resistance filed on August 21, 2002, Rojek admitted that FEMA and its director were the proper parties to be sued for its breach of contract of insurance coverage (i.e. disallowance of Rojek's claim), but that the claims against NCSI were "separate and different". Specifically, Rojek asserted that NCSI acted negligently in handling and processing the claim he submitted to NCSI. Rojek also asserted that NCSI's conduct rose to the level of negligent misrepresentation.

Neither party sought hearing on the matter, and this Court deems this motion fully submitted. For the following reasons, NCSI's Motion for Summary judgment is **granted**.

I. <u>Background Facts</u>

Davenport, Iowa, abutting the Mississippi River, is prone to flooding. Rojek owned a seasonal residence in Davenport, Iowa, and purchased a Standard Flood Insurance Policy, Policy # RL00007101, to insure both his real property and the contents contained therein. At all times pertinent to this motion, this Standard Flood

Insurance Policy was in effect, providing insurance coverage to Rojek in the event of a flood.

On or about April 4, 2001, Rojek's property flooded. Upon learning of his flooded property, Rojek notified his local Allstate agent (Polly A. McDowell-Derby). Mrs. McDowell-Derby notified the Defendants in this action. Having learned of the flood, NCSI appointed Bellmon Adjusters, Inc., to inspect Rojek's property, a task not performed until mid-May of 2001, as the flood waters did not recede from Rojek's property for 45 days.

Mike Bellmon of Bellmon Adjusters, Inc., inspected Rojek's property and prepared a proof of loss form based on this inspection, a form Rojek submitted to NCSI. Before deciding the amount of Rojek's claim in late July, 2001, NCSI required Rojek to submit an Elevation Certificate in order to determine the lowest floor elevation in relation to the base flood elevation in the immediate area surrounding Rojek's property.

Rojek alleges he was told on two or more occasions by NCSI employees that his claim would be paid in the amount reflected in the estimates provided in the proof of loss estimates created during the Bellmon Adjusters, Inc., inspection. Rojek further alleges that on one occasion he was told his claim would be paid in the amount reflected in the Bellmon Adjusters, Inc., proof of loss if he paid an increased premium on his Standard Flood Insurance Policy in the amount of \$3,554.00. Rojek did pay this adjusted increase in his policy.

The sum total Rojek submitted to NCSI as his losses from the flood amounted to \$68,265.74, which covered Rojek's flooded building and the contents inside. In

October 2001, Rojek was advised by NCSI that a total of \$18,639.09, or \$13,353.09 for his building and \$5,286.00 to cover the contents of the building, would be tendered.

On April 3, 2002, Rojek filed suit in the Davenport Division of the U. S. District Court for the Southern District of Iowa. In his complaint, Rojek asserts that "as the servicing agent for FEMA under the National Flood Insurance Program, [NCSI] owed a duty to [Rojek] to handle and process his claim in a just and proper manner".

Rojek alleges NCSI breached this duty to properly handle the claim. Additionally, Rojek asserts a negligent misrepresentation claim against NCSI asserting NCSI represented to Rojek that his claim would be paid consistent with the estimate submitted by the adjusters. Rojek asserts NCSI knew or should have known that the representations were false. Furthermore, Plaintiff asserts Defendant NCSI represented that, if Plaintiff paid the additional premium of \$3,554.00, the claim would finally be paid as represented, and that, in reliance upon NCSI's representations, Rojek submitted his additional premium payment.

II. Applicable Law

"It is uneconomical for private insurance companies to provide flood insurance with reasonable terms and conditions to those in flood prone areas." <u>Gowland v. Aetna</u>, 143 F.3d 951, 953 (5th Cir. 1998). Responding to this, "in 1968 Congress established the National Flood Insurance Program to provide insurance coverage at or below actuarial rates". <u>Id.</u> Currently, FEMA "administers the National Flood Insurance Policy and authorizes private insurers to issue a Standard Flood Insurance

Policy". <u>Transamerican Office Furniture v. Travelers Prop. & Cas.</u>, 2002 WL 31106567, at *1 (E.D. Pa. Sept. 19, 2002).

Congress has specifically authorized FEMA to appoint service agents to assist the NFIP in issuing and processing flood insurance applications and claims. See 42 U.S.C. § 4071. Pursuant to Congressional intent, codified at 44 C.F.R. § 62.3(a) are FEMA's regulations allowing the servicing agent to "assist in issuing flood insurance policies ... and to accept responsibility for delivery of policies and payment of claims for losses as prescribed by and at the discretion of the Administrator". See 44 C.F.R. § 62.3(a) (2001).

Policies issued by servicing agents must be issued in the form of a Standard Flood Insurance Policy and no provision of this policy can be altered, varied, or waived without the express written consent of the Federal Insurance Administrator. 44 C.F.R. § 61.13(d). At all times relevant to this suit, Defendant NCSI was the servicing agent for the Federal Insurance Administration. See 44 C.F.R. 62.3(b).

What is both significant and fatal to Rojek's claims against NCSI is that Rojek targets activities NCSI has allegedly engaged in while acting in its capacity as a FEMA servicing agent. "A suit against the director of FEMA under 42 U.S.C. § 4072 is a suit against the federal government." Nelson v. Becton, 732 F. Supp. 996, 998 (D. Minn. 1990) (citing In re Estate of Lee, 812 F.2d 253, 256 (5th Cir. 1987)). Section 4072 provides a limited waiver of sovereign immunity, providing that "actions should be brought against the Director ... [and] does not waive governmental sovereign immunity

as to any other persons". <u>Berger v. Pierce</u>, 933 F.2d 393, 396 (6th Cir. 1991) (referring to 42 U.S.C. § 4072).

Prior cases have analyzed the immunity afforded quasi-federal officials involved in aspects of the Medicare Act. See, e.g., Bushman v. Seiler, 755 F.2d 653 (8th Cir. 1985) (affirming the district court's dismissal of, on sovereign immunity grounds, libel and slander charges levied against a consultant employed by a Medicare carrier for the Department of Health and Human Services). Making an analogy to the reasons for extending immunity to fiscal intermediaries in the Medicare arena, other courts have extended this same rationale to grant immunity to fiscal agents taking part in the National Flood Insurance Program. See, e.g., Berger, 933 F.2d at 396 (discussing that section 4072 provides a limited waiver of sovereign immunity, allowing a suit against the director of FEMA but not fiscal agents of FEMA); see also Central Claims Serv. v. Computer Science Corp., 706 F. Supp. 463 (E.D. La. 1989); see generally, In re Estate of Lee, 812 F.2d 253, 255-257 (5th Cir. 1987) (distinguishing West v. Harris, 573 F.2d 873 (5th Cir. 1978).

In this case, Rojek specifically points out that NCSI is "the servicing agent for the National Flood Insurance Program". See Rojek complaint at ¶ 3. "Fiscal

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¹ <u>West v. Harris</u> was decided when the NFIP was operated by the Department of Housing and Urban Development ["HUD"] under "Part A" of the Act, 42 U.S.C. §§ 4051-56, and held "that private insurers who issued NFIP policies at [the time of the <u>West</u> case] were not protected by the government's sovereign immunity ...". <u>West v. Harris</u>, 573 F.2d at 882. <u>In re Estate of Lee</u> suggests that now fiscal agents are entitled to sovereign immunity because FEMA, under "Part B" of the Act, having assumed the responsibilities formerly executed by HUD under "Part A" of the Act, resulted in the government's increased role in the operation of the NFIP. <u>In re Estate of Lee</u>, 812 F.2d at 256.

intermediaries of [FEMA] are functionally indistinguishable from ... Medicare intermediaries." Central Claims, 706 F. Supp. at 467. Rojek has not alleged that any of NCSI's targeted activities occurred outside of the scope of NCSI's authority as a fiscal agent of FEMA. Thus, "the Bushman doctrine – that Medicare carriers, as intermediaries of [the Department of Health and Human Services], are federal officials entitled to sovereign immunity from [tort] claims arising out of acts within the scope of their authority – applies with equal force ... in this case". Id. Moreover, section 4072 authorizes a "right to sue the director of FEMA or the FIA Administrator only, not the FIA's fiscal agents". Berger, 933 F.2d at 396.

The case before this Court is factually different from those cases which have held that sovereign immunity is not appropriate where the insurer actually underwrites the policy. See, e.g., NuAir Mfg. Co. v. Frank B. Hall & Co., 822 F.2d 987 (11th Cir. 1987). In this case, NCSI does not underwrite the flood insurance at issue, but, rather, NCSI serves as the agent of the federal government, and all actions taken by NCSI are performed under the authorization and control of FEMA. See NCSI Ex. 1 Alan Pryor Aff. at ¶¶ 3-4.² In other words, NCSI "acted as a link between FEMA and [the] independent claims agents; it is this role as a vehicle for effectuating government policy that confers sovereign immunity on them". See Central Claims, 706 F. Supp. at 466 n.1. NCSI, as the "designated servicing agent of FEMA under the NFIP ... assumes

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² The record contains no dispute of the statements in the affidavit that the actions of NCSI were performed under the authorization and control of FEMA.

the status as a quasi-federal official ... as such, [NCSI] enjoys sovereign immunity from suits based on acts within the scope of the [NCSI's] authority". <u>Id.</u> at 470.

Summary judgment serves the purpose of determining whether a trial is necessary. See Shaw v. The McFarland Clinic, P.C., 2002 WL 31268895, at *5 (S.D. Iowa Oct. 11, 2002) (referring to 11 Moore's Federal Practice 3d, § 56.02, pp. 56-20 (MB 3d ed. 1997)). Granting summary judgment is proper where the record, when viewed in the light most favorable to the nonmoving party and allowing that party the benefit of all reasonable inferences, demonstrates no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Id.; see also Fed. R. Civ. P. 56(c).

Using the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, the party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met this burden, the burden then switches to the nonmoving party to show that there is a genuine issue needing to be resolved at trial. Id.; see also Fed. R. Civ. P. 56(c), (e).

In light of this standard and considering the circumstances of this case, Rojek has not, and, in fact, cannot, demonstrate a genuine issue for trial exists with respect to Defendant NCSI. NCSI, as a matter of law, is entitled to immunity in this case. For

these reasons, Defendant NCSI's Motion for Summary Judgment (Clerk's No. 7) is **granted**, and the case against NCSI is dismissed in its entirety.

UNITED STATES DISTRICT COURT

IT IS SO ORDERED.

Dated this 18th day of October, 2002.

9